

## **TELEPHONE, FAX AND E-MAIL SOLICITATION**

### Introduction

The Idaho Real Estate Commission is often asked whether or not an unlicensed person can perform telemarketing services on behalf of a licensee. Most often, licensees want to employ the services of unlicensed assistants or telemarketing firms, from in or out of state, to make unsolicited telephone calls to the residential phones of persons whose listings have expired recently, persons who live in a neighborhood where homes are selling well, or persons who currently have their houses offered for sale by owner (FSBO's).

Licensees considering telephone solicitation or sending any unsolicited information to a wireless device (e-mail or text-messaging) should be aware of the following:

**1. Any person who, by telephone solicitations, attempts to secure listings or attempts to secure appointments for listing presentations to any individual, must hold an active Idaho real estate license.**

**2. All telephone solicitors, including real estate licensees, must comply with the *Idaho Telephone Solicitation Act, (ITSA)*, and the federal *Telephone Consumer Protection Act (TCPA)*.**

3. Federal law prohibits licensees from sending unsolicited faxes, e-mails, and text messages – with narrow exceptions. Licensees should familiarize themselves with the restrictions imposed by the TCPA, the *Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM)*, and the *Junk Fax Prevention Act*.

## **DISCUSSION**

### **#1 – A Real Estate License Is Required**

Under the Idaho Real Estate License Law, no person may engage in the business of a “real estate broker” in Idaho without first obtaining an active Idaho real estate license (Section 54-2002, Idaho Code). Section 54-2004, Idaho Code, defines a real estate broker:

#### **54-2004. Definitions.**

“Real estate broker” means and includes:

(a) Any person other than a real estate salesperson, who, directly or indirectly, while acting for another, for compensation or a promise or an expectation thereof, engages in any of the following: sells, lists, buys, or negotiates, or offers to sell, list, buy or negotiate the purchase, sale, option or exchange of real estate or any interest therein or business opportunity or interest therein for others.

(b) Any actively licensed broker while, directly or indirectly, acting on the broker's own behalf;

(c) Any person who represents to the public that the person is engaged in any of the above activities;

(d) Any person who directly or indirectly engages in, directs, or takes any part in the procuring of prospects, or in the negotiating or closing of any transaction which does or is calculated to result in any of the acts above set forth;

(e) a dealer in options as defined in this section.

It is the opinion of the Idaho Real Estate Commission that any person who, by telephone solicitations, attempts to secure listings or attempts to secure appointments for listing presentations to any individual, must first be licensed as a real estate broker or sales associate within the state of Idaho.

While the *Idaho Real Estate License Law and Rules* do not specifically address telephone solicitation of listings, general rules regarding listings, including agency disclosure, fairness, prohibition of misrepresentation, etc. would apply.

A licensee may engage in telemarketing. However, the licensee should be familiar with the state and federal laws applicable to such marketing activities.

## **#2 – State and Federal Regulations Apply to Telephone Solicitation**

A. The **Idaho Telephone Solicitation Act**. Enacted in 1992, the *Idaho Telephone Solicitation Act*, (“ITSA”), (Title 48, Chapter 10, Idaho Code) regulates telephone solicitation in Idaho, including solicitation by fax. This law is enforced by the Idaho Attorney General.

“Telephone solicitation” means “Any unsolicited telephone call to a purchaser for the purpose of asking, inducing, inviting, requesting, or encouraging the purchaser to purchase or invest in goods or services during the course of a telephone call . . .” [Idaho Code § 48-1002\(10\)](#). A “telephone solicitor” is “any person who, on his own behalf or through other persons or through use of an automatic dialing-announcing device, engages in a telephone solicitation.” [Idaho Code § 48-1002\(11\)](#)

i. Do Not Call Registry. Under ITSA, it is illegal for telephone solicitor to call Idaho phone numbers registered on the National Do Not Call Registry (The State no longer publishes a separate state No Call List.) The law specifically permits a business to

call consumers with whom the business has an established business relationship, even if the consumer is on the Registry. Businesses can obtain Idaho phone numbers registered on the National Do Not Call Registry through the internet, at:

<https://telemarketing.donotcall.gov/default.aspx>

*ii. Unlawful Acts.* **All** telephone solicitation in Idaho is subject to the ITSA's "unlawful acts" prohibition, found at section 48-1003, Idaho Code. Prohibited acts include: intimidation; refusal to hang up immediately upon request; misrepresentation of or failure to disclose material facts concerning the services being offered; and sending any unsolicited advertisement by fax.

More information about the Idaho Telephone Solicitation Act may be accessed at:

<http://www2.state.id.us/ag/consumer/ncl/telemarketerlinks.htm>

**B. The Federal Telephone Consumer Protection Act.** The federal *Telephone Consumer Protection Act* of 1991, ("TCPA"), 47 U.S.C. Section 227, and the regulations promulgated by the Federal Communications Commission (FCC), govern telephone solicitations and regulate the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines. These laws apply to ALL solicitors; ***there are no exemptions for real estate licensees.*** So brokers and sales associates contacting prospects must be familiar with the federal TCPA and its implementation by the Federal Communications Commission (FCC). The applicable rules and their amendments may be accessed at:

<http://www.ftc.gov/bcp/edu/microsites/donotcall/businfo.html>

#3. Federal law also prohibits the sending of unsolicited faxes and unsolicited e-mail messages to wireless devices, such as cell phones. The Junk Fax Prevention Act makes the restrictions of the Telephone Consumer Protection Act (TCPA) applicable to ***faxes.*** The federal CAN-SPAM Act supplements the TCPA and sets forth specific requirements for senders of commercial e-mails.

The prohibitions and requirements apply to all "commercial messages," meaning messages for which the primary purpose is to advertise or promote a commercial product or service. However, they do not cover "transactional or relationship" messages, or notices to facilitate a transaction that the recipient has already agreed to. They do not prohibit messages that the recipient has expressly authorized the licensee to send. Further information concerning the requirements of these federal laws can be accessed as follows:

CAN-SPAM Act: <http://www.fcc.gov/cgb/consumerfacts/canspam.html>

Unsolicited Faxes: <http://www.fcc.gov/cgb/consumerfacts/unwantedfaxes.html>

## **CONCLUSION**

1. An unlicensed person must not engage in telephone solicitations of any kind designed to procure buyers, listings, or appointments for real estate listing presentations. Such activities require an active Idaho real estate license.

2. The *Idaho Telephone Solicitation Act* and the federal *Telephone Consumer Protection Act* (TCPA), and the CAN-SPAM ACT may impact any telephone solicitations made by licensees to prospective buyers and sellers. Due to the potential for government sanctions and private lawsuits for failure to comply with either law, licensees are encouraged to consult their attorneys and obtain further information prior to engaging in telephone solicitation, or the sending by telephone, fax or e-mail of any unsolicited advertisement.

\*\*\*\*\*

Information concerning the Idaho TCPA and the Rules of the Attorney General may be found through the Idaho Attorney General's website:

<http://www2.state.id.us/ag/consumer/ncl/telemarketerlinks.htm>

Information concerning the federal TCPA (15 U.S.C. 6101– 6108) and the Rules of the FCC (16 CFR 310) may be found through the FCC web site:

[1  
http://www.ftc.gov/bcp/edu/microsites/donotcall/index.html](http://www.ftc.gov/bcp/edu/microsites/donotcall/index.html)

or by requesting copies from the FCC at:  
Federal Communications Commission  
Consumer & Governmental Affairs Bureau  
445 12<sup>th</sup> Street, SW  
Washington D.C. 20554